No. 613

In the Supreme Court of the United States

OCTOBER TERM, 1939

THE UNITED STATES, PETITIONER

v.

GEORGE S. BUSH & CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the trial court (R. 39–46) is reported in R. D. 4034, 71 Treas. Dec. 1291. The opinion of the Customs Court, appellate term (R. 48–58), is reported in R. D. 4253, 73 Treas. Dec. 1432. The opinions in the Court of Customs and Patent Appeals (R. 61–76) are reported in 104 F. (2d) 368.

JURISDICTION

The judgment of the Court of Customs and Patent Appeals was entered June 15, 1939 (R. 77). A petition for rehearing was denied October 2, 1939

(R. 77). The petition for a writ of certiorari was filed on December 29, 1939, and was granted on February 5, 1940 (R. 79). The jurisdiction of this Court is invoked under section 195 of the Judicial Code, as amended (28 U. S. C. sec. 308).

QUESTIONS PRESENTED

Pursuant to section 336 of the Tariff Act of 1930 the United States Tariff Commission conducted an investigation to ascertain the difference in the costs of production of canned clams in the United States and in Japan, the principal competing country. It reported the results of its investigation to the President of the United States, who thereupon issued a proclamation increasing the duty on canned clams. The present suit was brought by an importer of canned clams, alleging the proclamation of the President to be void. The questions are: (1) Whether the Customs Court has power to review the facts and the reasoning upon which the Tariff Commission based its recommendation to the President, and if dissatisfied to declare the proclamation void; and (2) if the court has such power, whether the Tariff Commission erred in its method of ascertaining the Japanese cost of production of canned clams.

STATUTES INVOLVED

The relevant portions of the Tariff Act of 1930, c. 497, 46 Stat. 590, are set forth in the Appendix, *infra*, pp. 28–34.

STATEMENT

On May 1, 1934, the President of the United States proclaimed that a change in the duty on canned clams was necessary to equalize the difference in the costs of production in the United States and in the principal competing country, Japan, and that the duty, which up to that time had been at the rate of 35% ad valorem *on a foreign value basis,* as defined in section 402 (e) of the Tariff Act of 1930, should be changed to 35% ad valorem *on the basis of the American selling price,* as defined in section 402 (g) of the Act (R. 37–38). The proclamation was made after an investigation and report by the United States Tariff Commission under the flexible tariff provisions of the Tariff Act of 1930 (R. 9–37). Section 336 (c. 497, 46 Stat. 590, 701).

The Commission instituted the investigation on June 28, 1932, in response to an application for an increase in the duty on all canned clams. Public notice of a hearing was given on the same date. The hearing was held on October 5, 1932, and interested parties were given an opportunity to be present, to produce evidence, and to be heard (R. 11). As a result of its investigation the Commission found that the duty of 35% ad valorem on the foreign dutiable value fixed by the statute did not equalize the difference in the costs of production of the domestic article and the Japanese article and that the rate of duty necessary to equalize the dif-

ference, within the limits permitted by section 336 (b) of Title III of the Tariff Act of 1930, was 35% ad valorem based upon the American selling price of the domestic article (R. 17). It accordingly recommended to the President this change in the basis of value (R. 11) and its recommendation was approved by the President in his proclamation of May 1, 1934 (R. 38).

In computing the Japanese costs of production the Commission, pursuant to the authority conferred upon it by section 336 (e) (2) (A), accepted as evidence of cost of production the weighted average of the invoice prices of Japanese canned clams entered at San Francisco, the principal port of entry, for a representative period. The period considered as representative extended from December 1, 1930, to September 30, 1932 (R. 27). Since, however, the invoice prices were in terms of Japanese yen it was necessary, for purposes of comparison with domestic costs, to convert the Japanese costs so determined into terms of United States dollars. This was done at the average rate of exchange for 1932 (R. 14). The reason that the 1932 rate of exchange was used was that Japan went off the gold standard on December 13, 1931, and the value of the yen in terms of United States dollars declined steadily from that date until November 1932 when it was worth only $0.2062 as against its par value of $0.4985 (R. 30). After that time the yen increased somewhat in value (*id.*), but at the time of the Commission's report to the President

the prevailing rate of exchange was not much higher than the average rate for 1932 (R. 14).[1] With respect to this matter the Commission reported to the President as follows (R. 14):

> 6. The years 1931 and 1932 are representative with respect to the domestic cost of production of canned clams and the invoice prices of Japanese canned clams, in terms of Japanese currency. During most of 1931 the exchange rate of the Japanese yen for the dollar was not much below par, whereas since that time it has been much below par. For this reason the invoice prices of the Japanese product imported in 1931, when converted to dollars at the then current rate of exchange, are not representative of the present or probable future invoice values in terms of dollars. The Commission has, therefore, used, for comparison with the domestic costs, the invoice prices in yen as evidence of costs of the Japanese product during 1931 and 1932, converted to dollars at the average rate of exchange for 1932. Although the exchange rate of the yen has risen since April 1933, the rate now prevailing is not much higher than the average rate for 1932.

After the President issued his proclamation, the respondent imported some canned clams and they

[1] The average rate of exchange for the year 1932 was $0.2811 (R. 28). The present rate of exchange, as certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, is $0.2343. Treasury Decisions, Vol. 75, No. 33 (February 15, 1940), p. 2.

were appraised, pursuant to the proclamation, on the basis of the American selling price. The respondent filed an appeal for reappraisement with the United States Customs Court, pursuant to section 501 of the Tariff Act of 1930. At the trial respondent contended that the proclamation changing the basis of value was invalid and that the proper basis for appraising the merchandise was the foreign value as defined in section 402 (c). It was admitted that the Commission had proceeded properly in ascertaining the Japanese cost of production, in yen, by use of a weighted average of invoice prices or values, and that the period selected as representative for this purpose was proper. The validity of the proclamation was challenged primarily on the ground that the Commission had no legal authority to use one period to ascertain the weighted average of invoice prices in yen and another period to ascertain the rate of exchange for converting the yen into United States dollars.

The judge of the Customs Court sitting in reappraisement sustained the appraised value, holding that the matters complained of concerned merely the internal fact-finding processes of the Tariff Commission and the President and that these matters were not justiciable (R. 39–46). On appeal to the appellate division of the Customs Court the judgment of the single judge was affirmed (R. 48–58). On appeal to the Court of Customs and Patent Appeals the judgment of the Customs

Court was reversed, two judges dissenting. (R. 61–76).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In failing to hold that the Customs Court had no power to review the facts or the reasoning upon which the Tariff Commission based its recommendation to the President for an increase in the duty on canned clams.

2. In holding that section 336 (e) (2) (A) of the Tariff Act of 1930 prohibited the Tariff Commission from using a different period for ascertaining the proper rate of exchange at which to convert Japanese yen into terms of United States dollars from the period selected as representative in determining the weighted average of the invoice prices of the Japanese canned clams.

3. In holding that the provision of section 336 (e) (2) (A) that the Tariff Commission may accept as evidence of the cost of production of a foreign article, "the weighted average of the invoice prices or values for a representative period" should be construed to require the Commission to ascertain the invoice prices in United States currency for that period.

4. In holding that the investigation made by the Tariff Commission was illegal and that the proclamation by the President, based upon such investigation, was illegal and void.

5. In holding that the conversion of currency is

involved in finding the basic cost of production of a foreign article.

6. In reversing the judgment of the Customs Court.

SUMMARY OF ARGUMENT

I

The court below had no power to review the facts and reasoning on which the Tariff Commission based its recommendation to the President and to declare the President's proclamation void because it believed that the Commission had erroneously interpreted the Tariff Act in ascertaining the foreign costs of production. The action taken by the President and the Commission was in substance one stage of the legislative process. *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294. Such action is not subject to judicial impeachment if the prescribed forms of legislation have been regularly observed. *Id.* Here the investigation conducted by the Commission, the hearing which it held after due notice to all interested parties, its report to the President, and his proclamation approving the Commission's recommendation constituted a full and regular observance of the forms prescribed. Under these circumstances there can be no judicial review of the legislative judgment reached by the Commission and the President, and a *fortiori* no review of the facts and the reasoning on which that judgment was based.

Moreover, it does not appear from the proclamation whether the President accepted the reasoning of the Tariff Commission or predicated his approval of the Commission's recommendation upon his own conclusions drawn from the facts set forth in the Commission's report. If the reasoning of the Commission was in fact based on an erroneous interpretation of the statute, the presumption that the President acted properly requires the courts to assume that he followed the latter course. Consequently, the alleged error in the reasoning of the Tariff Commission cannot possibly serve to invalidate the proclamation.

II

The holding of the court below that, under Section 336 (e) (2) (A), if the weighted average of the invoice prices for a representative period is used to determine foreign costs of production, those prices must be converted into terms of dollars at the rate of exchange prevailing during that period, has no warrant in the provisions of the Tariff Act and to a very large extent nullifies the intention of Congress in enacting the flexible tariff provision.

Section 336 contains no mention of conversion of currency. In the absence of express statutory provision it seems clear that in converting foreign costs into dollars the Commission may, as it did in this case, use the rate of exchange prevailing at the time of its investigation, since this rate reflects the then existing differences in costs of

production. If, as held by the court below, the Commission is required to convert foreign costs into dollars at the rate of exchange which prevailed during the period used to ascertain the foreign costs but which, due to subsequent exchange fluctuations, is not the rate prevailing at the time of the investigation, the Commission will be utterly unable to perform its function of determining what change in duty will equalize the differences in costs of production at the time when the change becomes effective. Although the legislative history of Section 336 shows plainly that fluctuating foreign exchange was one of the important factors which Congress considered as creating the need for a flexible tariff law, the decision below renders the provision largely useless for this purpose.

Moreover, even if the construction placed upon Section 336 (e) (2) (A) by the court below is correct, the action of the Commission was still authorized under other provisions of Section 336.

ARGUMENT

I

THE CUSTOMS COURT HAD NO POWER TO REVIEW THE FACTS AND REASONING ON WHICH THE TARIFF COMMISSION BASED ITS RECOMMENDATION TO THE PRESIDENT

Section 336 of the Tariff Act of 1930, *infra*, p. 28, the so-called "flexible tariff" provision, establishes a well-defined procedure whereby the rate of duty prescribed in the Act for any article may be

changed if necessary to equalize the difference in the costs of producing the article in this country and in the principal competing country. Section 336 (a) provides that the Tariff Commission shall institute an investigation to determine the difference in costs of production either upon the request of the President, upon resolution by Congress, upon its own motion, or, in some circumstances, upon the application of an interested party. In the course of the investigation the Commission is to hold hearings, give reasonable public notice thereof, and afford reasonable opportunity for parties interested to be present, produce evidence and to be heard. The Commission is then to report to the President the results of the investigation and its findings; if it finds that the duties fixed by the statute do not equalize the differences in costs of production in this country and in the principal competing country, it is required to specify in its report such increases or decreases in the rates as it finds necessary for this purpose. Section 336 (b) provides that if equalization cannot be accomplished without increasing or decreasing the rates of duty by more than 50%, the Commission shall so state in its report and shall specify the ad valorem rate of duty based on the American selling price of the domestic article as it finds to be necessary for equalization.

Section 336 (c) provides as follows:

> The President shall by proclamation approve the rates of duty and changes in clas-

> sification and in basis of value specified in any report of the commission under this section, if in his judgment such rates of duty and changes are shown by such investigation of the commission to be necessary to equalize such differences in costs of production.

The procedure thus prescribed was fully observed in the present case. The Commission instituted an investigation in response to an application for an increase in duty, it gave public notice of a hearing and, at the hearing, parties interested were given reasonable opportunity to be present, to produce evidence, and to be heard (R. 11). The Commission then submitted a report to the President in which it set forth its findings in detail and stated its conclusion that a 50% increase in the duty fixed by the statute for canned clams would not equalize the difference in the costs of production of the domestic and the foreign article, and that "the rate of duty necessary to equalize such difference within the limits permitted by section 336 (b) of title III of the Tariff Act of 1930 is 35 percent ad valorem based upon the American selling price of the domestic article" (R. 17). In an appendix to its report the Commission set forth a complete summary of the information obtained in its investigation (R. 18–37).

Upon the basis of this report the President issued the proclamation here contested (R. 37–38). In this proclamation the President stated that, in

his judgment, the change in the basis of duty for canned clams recommended by the Commission was shown by the investigation of the Commission to be necessary to equalize the differences in costs of production and the change was therefore approved.

In our view the validity of the proclamation is not subject to attack in the present proceeding. This Court has frequently held that where Congress has empowered a public officer to take some specified legislative action when, in his judgment, such action is necessary to carry out the policy of Congress, the judgment of the officer as to the existence of facts making the action necessary is not subject to judicial review. *United States* v. *Chemical Foundation*, 272 U. S. 1, 14–15; *Dakota Central Tel. Co.* v. *South Dakota*, 250 U. S. 163, 184; *Monongahela Bridge* v. *United States*, 216 U. S. 177, 195; *The Philadelphia & Trenton R. R. Co.* v. *Stimpson*, 14 Pet. 448, 458; *Martin* v. *Mott*, 12 Wheat. 19, 30; cf. *Sterling* v. *Constantin*, 287 U. S. 378, 399. To be sure, if Congress "provides for an investigation of the facts, upon notice and after hearing, before final action is taken, the courts can see to it that Executive officers *conform their action to the mode prescribed by Congress.*" [Italics supplied.] *Monongahela Bridge* v. *United States, supra*, at 195. But if the procedure established by Congress is observed, the "validity of the reasons stated in the orders, or the basis of fact

on which they rest, will not be reviewed by the courts." *United States* v. *Chemical Foundation, supra,* at 15.

There can be no doubt of the applicability of this rule to the present case, for the decision in *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294, establishes, were it not otherwise clear, that the action taken by the Commission and the President was in substance one stage of the legislative process. The Court stated (p. 318):

> No one has a legal right to the maintenance of an existing rate or duty. Neither the action of Congress in fixing a new tariff nor that of the President in exercising his delegated power is subject to impeachment *if the prescribed forms of legislation have been regularly observed.* [Italics supplied.]

Here the investigation conducted by the Commission, the hearing which it held after due notice to all interested parties, its report to the President and his proclamation approving the Commission's recommendation, constituted a full and regular observance of the forms prescribed. That being so, under the cases cited there can be no judicial review of the legislative judgment reached by the Commission and the President, and *a fortiori* no review of the facts and the reasoning on which that judgment was based.

This conclusion was reached both by the judge sitting in reappraisement and by the appellate division of the Customs Court. But the court below, two judges dissenting, reversed the judgment of the Customs Court and held in effect that the Customs Court did have jurisdiction to review the facts and reasoning upon which the Commission based its recommendation to the President. The theory of the court was that the statute prohibited the Commission from using a different period for ascertaining the rate of exchange for conversion purposes from the period selected as representative in determining the weighted average of the invoice prices, that because the Commission had used such a different period in violation of the statute its investigation was "illegal," and that, therefore, "the proclamation by the President, based upon such investigation, was without authority of law, illegal, and void" (R. 70).

This holding of the court below fails to observe the essential distinction between administrative orders directed against particular persons, which are subject to judicial impeachment if they are without evidence to support them, and legislative action taken by a public officer pursuant to authority delegated to him, which is not subject to such impeachment if the prescribed forms of legisla-

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tion have been observed. See *Norwegian Nitrogen Products Co.* v. *United States*, *supra*, at 318–319; cf. *Pacific States Co.* v. *White*, 296 U. S. 176, 186. This distinction cannot be obliterated by saying that if the Tariff Commission follows an erroneous method for ascertaining foreign costs of production, its investigation is "illegal" and a necessary jurisdictional prerequisite to the issuance of a proclamation by the President is lacking. Cf. *Adams* v. *Nagle*, 303 U. S. 532, 542. Under the statute, the investigation by the Commission is directed solely to the ascertainment of a fact, *i. e.*, the difference between the costs of production here and abroad. Since, under the decisions above cited, the courts may not review the sufficiency of the facts upon which the Commission based its conclusion, it follows as of course that they may not review the process by which the Commission drew its conclusion from those facts. The Commission's investigation is no less an observance of the prescribed forms of legislation if its conclusion is based on an erroneous application of the facts than if it is based on an erroneous evaluation of the facts. In either event, the Commission's conclusion, being a finding of fact made after due

The opposite conclusion expressed by the court below in *David L. Moss Co., Inc.*, v. *United States*, 103 F. (2d) 395 is, in our view, wrong for the same reason that the decision of that court is wrong in the present case.

notice and hearing, is not subject to impeachment.

The present record well illustrates the error of the court below. The Commission's report sets forth all of the relevant facts. It details the imports of Japanese canned clams for the period from December 1, 1930, to September 30, 1932, conceded by respondent to be representative, the dutiable value of the merchandise in Japanese currency, and the dutiable value of the merchandise converted into United States currency both at the prevailing rate of exchange at the date of export and at the average rate of exchange for the year 1932 (R. 37). No provision of law required it to set forth the reasoning by which it drew its conclusion from these facts; that it did set forth its reasoning, and that that reasoning, in the view of the court below, was based upon an erroneous interpretation of the statute, does not invalidate its investigation or its recommendation, much less the proclamation of the President.

Moreover, it does not appear from the proclamation whether the President accepted the reasoning of the Tariff Commission or predicated his approval of the Commission's recommendation upon his own conclusions drawn from the facts set forth in the Commission's report. If the reasoning of the Tariff Commission was in fact based on an erroneous interpretation of the statute, the presumption that the President acted properly

(*United States* v. *Chemical Foundation, supra; The Philadelphia & Trenton R. R. Co.* v. *Stimpson, supra*) would seem to require the courts to assume that he followed the latter course. In this view of the case, the alleged error in the reasoning of the Tariff Commission cannot possibly serve to invalidate the proclamation.

II

THE TARIFF COMMISSION COMMITTED NO ERROR IN ASCERTAINING THE FOREIGN COSTS OF PRODUCTION

Section 336 (e) prescribes the method by which the Commission is to ascertain the foreign costs of production. It provides as follows:

> * * * In ascertaining under this section the differences in costs of production, the commission shall take into consideration, insofar as it finds it practicable: * * *
>
> (2) IN THE CASE OF A FOREIGN ARTICLE.—
>
> (A) The cost of production as hereinafter in this section defined, or, if the commission finds that such cost is not readily ascertainable, the commission may accept as evidence thereof, or as supplemental thereto, the weighted average of the invoice prices or values for a representative period * * *;
>
> (B) transportation costs and other costs incident to delivery to the principal market or markets of the United States for the article;
>
> (C) other relevant factors that constitute an advantage or disadvantage in competition,

including advantages granted to the foreign producers by a government, person, partnership, corporation, or association in a foreign country.

Pursuant to the provisions of Section 336 (e) (2) (A), the Commission accepted as evidence of the Japanese cost of production the weighted average of the invoice prices, in yen, from December 1, 1930, to September 30, 1932; it then converted these yen prices into dollars at the average rate of exchange for 1932. The court below held that this was a violation of the statute on the sole ground that Section 336 (e) (2) (A) should be construed as though it read, "the commission may accept as evidence of the cost of production of a foreign article the weighted average of the invoice prices or values *in United States currency for a representative period*" [italics of the court] (R. 66). This holding has no warrant in the provisions of the Tariff Act and to a large extent nullifies the intention of Congress in enacting the flexible tariff provision.

1. The purpose of the flexible tariff provision is to permit prompt changes in the amount of duty payable on imported merchandise in order to meet changing conditions of commerce which have made the duty fixed by the statute too high or too low to equalize the difference in the costs of production here and abroad. In making a change of duty

under Section 336, therefore, the purpose must always be to fix a duty which will serve to equalize the differences in costs of production at the time when the change becomes effective.

Section 336 contains no mention of conversion of currency, yet in every investigation undertaken by the Commission, foreign costs, as determined in the foreign currency, must be translated into terms of dollars for purposes of comparison with domestic costs. In the absence of express statutory provision, it seems clear that in converting foreign costs into dollars the Commission may, as it did in this case, use the rate of exchange prevailing at the time of its investigation, since this rate reflects the then existing differences in costs of production. If, as held by the court below, the Commission is required to convert foreign costs into dollars at the rate of exchange which prevailed during the period used to ascertain the foreign costs but which, due to subsequent exchange fluctuations, is not the rate prevailing at the time of the investigation, the Commission will be utterly unable to perform its function of determining what change in duty will equalize the differences in costs of production at the time when the change becomes effective. Although the legislative history of section 336 shows plainly that fluctuating foreign exchange was one of the important factors which Congress considered as creating the need for a

flexible tariff law,[3] the decision below renders the provision largely useless for this purpose.[4]

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[3] The flexible tariff provision was first introduced in Section 315 of the Tariff Act of 1922 (42 Stat. 858, 941–943). At the time that Act was under consideration, many of the currencies in Europe were falling in exchange value. The ensuing decline in the base on which ad valorem values were computed so greatly reduced the duties that a destructive inundation of European goods was feared. Because of this, the House Committee on Ways and Means, in reporting the bill (H. R. 7456, 67th Cong., 1st Sess.), which was ultimately enacted as the Tariff Act of 1922, provided for the assessment of ad valorem rates of duty on the basis of the American selling prices (H. Rept. 248, 67th Cong., 1st Sess., p. 21). This provision was enacted by the House (61 Cong. Rec. 4198) after its proponents had explained its necessity on the ground, among others, of fluctuating exchange. 61 Cong. Rec. 3477, 3478. When the bill came to the Senate, the Senate Finance Committee reported that the American valuation plan was impracticable of administration and recommended in lieu thereof a flexible tariff provision to accomplish the same purpose. S. Rept. 595, 67th Cong., 2d Sess., pp. 3, 6–7; see also 62 Cong. Rec. 11186, 11189. This change was in line with the recommendation contained in a message of the President to Congress on December 6, 1921, in which he urged the enactment of a flexible tariff policy so that rates might be adjusted to meet unusual and changing conditions. 62 Cong. Rec. 37. The President expressly referred to exchange problems as outstanding in this connection. *Id.* The recommendation of the Finance Committee was adopted by the Senate (62 Cong. Rec. 11627) and the Senate amendment agreed to by the House after conference (62 Cong. Rec. 12718; see also *id.* at 12508). Section 336 of the Tariff Act of 1930 is merely a refinement of Section 315 of the Tariff Act of 1922.

[4] The Tariff Commission informs us that in the case of approximately 35 investigations made by the Commission

The facts of the present case illustrate the point. The need for a change in the duty on canned clams arose largely from the fact that Japan went off the gold standard on December 13, 1931. By June 1932, when the Commission instituted its investigation, the yen had greatly depreciated in terms of United States dollars, thereby greatly increasing the difference, in terms of dollars, between the Japanese and domestic costs of production. In order to determine the Japanese cost of production by use of weighted average invoice prices, the Commission was required to use invoice prices over a period extending for a considerable time before the start of its investigation, when the exchange rate of the yen was substantially higher than it was in 1932. If the Commission were required, as the court below held, to convert the invoice prices into terms of United States currency at the prevailing rate on the date of exportation, the difference between the Japanese costs of production, so determined, and the domestic costs of production would not reflect the depreciation in the value of the yen—one of the important facts necessitating the change in duty. The appropriate way

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under Section 336, currency fluctuation has been an important element in determining the action recommended. Increases in duty have been proclaimed on 13 articles when the currency of the principal competing country was below par in terms of United States dollars. In the case of 8 of these 13 articles, Japan was the principal competing country and in each instance the increase was found necessary after Japan went off the gold standard.

for the Commission to determine the difference in the costs of production at the time of its investigation was by means of the method actually used—i. e., to determine the Japanese costs of production in yen over a representative period and then to convert those costs into dollars at the average rate of exchange prevailing at the time of the investigation.

There is nothing arbitrary in this method of ascertaining costs. Depreciation of the currency of a country in terms of foreign exchange has, at least over limited periods of time, a relatively small influence upon the domestic value of that currency and upon the domestic costs of production, expressed in terms of that currency. League of Nations World Economic Survey, 1932–1933, pp. 41–42; Harris, *Exchange Depreciation* (1936) p. 474; Edie, *Dollars*, pp. 94–95. Thus the Commission was fairly entitled to assume that, despite the fact that Japan went off the gold standard on December 13, 1931, the weighted average of the invoice prices of Japanese canned clams for the 22-month period which it took as representative accurately reflected the Japanese cost of production, in yen, at the time of its investigation.[5] But in order to determine the difference in costs of production, in dollars, at the time of its investigation,

[5] The record shows that the invoice prices of the Japanese article, in yen, were in some instances lower in 1932 than in 1931, although Japan went off the gold standard on December 31, 1931 (R. 28).

it was required to convert the yen costs into dollars at the average rate of exchange then prevailing. Had it made the conversion at the rate prevailing during the 22-month period of importation, it would have been using a rate which had merely an historical interest and which did not represent conditions as they actually existed at the time that action under the flexible tariff provision was being considered.

The construction placed on Section 336 (e) (2) (A) by the court below prevents the Commission and the President from making such prompt modifications of tariff duties as are necessary to offset changes in the value of foreign currencies. In a case where the value of the currency of a given country has undergone a sudden and material change, an investigation in which the old rate of exchange is applied as the conversion factor would in most cases show little or no need for equalization, even though the depreciation of the foreign currency quite obviously made equalization highly necessary. The foreign article would therefore enjoy an advantage in competition with the domestic article which the Commission and the President would be powerless to prevent until another investigation could be made. And, even then, a further fluctuation of the foreign currency might produce a similar result at the end of the later investigation. Thus, under the decision of the court below, the Commission and the President are effectively prevented from carrying out the purpose of

the flexible tariff provision in almost every case where currency fluctuation is a major factor.

It is plain, therefore, that the interpretation of Section 336 (e) (2) (A) adopted by the court below does not correctly reflect the intention of Congress. The method adopted by the Commission to determine the Japanese costs of production, on the other hand, is entirely consonant with the provisions of this section and manifestly carries out the Congressional purpose.

2. Even if the construction which the court below placed on Section 336 (e) (2) (A) were correct, the Commission's investigation would still not be "illegal." The provision of Section 336 (e) (2) (A) for use of the weighted average of invoice prices or values for a representative period is permissive in character; the Commission "may" accept such an average as "evidence" of the foreign costs of production "in so far as it finds it practicable." Since the provision is permissive, there is no warrant for holding that the Commission's investigation was in violation of the statute because the Commission refused to accept as evidence the weighted average of invoice prices converted into United States currency at the rate of exchange prevailing on the dates of exportation during the representative period. The Commission, having found that it was not practicable to use this method of conversion (R. 14), was under no statutory compulsion to do so. Moreover, the further provision of Section 336 (e) that the Commission may, in

its discretion, consider "other relevant factors that constitute an advantage or disadvantage in competition" plainly authorized the Commission to take into consideration the decline in the value of the yen after the period selected as representative for determining the weighted average of the invoice prices. It needs no argument to demonstrate that a decline in the value of Japanese currency in terms of the dollar is a factor which gives a Japanese producer a competitive advantage in the United States over a domestic producer.

The error of the Commission, if error there was, reduces itself therefore to the fact that in its report to the President (R. 15) the Commission relied on an allegedly improper interpretation of Section 336 (e) (2) (A) as the source of its authority for action which was plainly within its powers under Section 336 considered in its entirety. Such an error obviously furnishes no basis for judicial impeachment of a Presidential proclamation.*

* In its brief in opposition to the petition for certiorari, respondent suggests that if the procedure followed by the Commission and the President was in compliance with the statute, the statute is an unconstitutional delegation of legislative power (Br. pp. 4–5, 10). This contention seems foreclosed by the decision of this Court in *Hampton & Co. v. United States*, 276 U. S. 394, which upheld the flexible provision of the Tariff Act of 1922 which was broader in scope than Section 336 of the 1930 Act. Consequently, we do not discuss the question in this brief.

CONCLUSION

It is respectfully submitted that the decision below should be reversed.

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MARCH 1940.

APPENDIX

Tariff Act of 1930, c. 497, 46 Stat. 590 (U. S. C., Title 19, Sec. 1336):

SEC. 336. EQUALIZATION OF COSTS OF PRODUCTION.

(a) CHANGE OF CLASSIFICATION OR DUTIES.—In order to put into force and effect the policy of Congress by this Act intended, the commission (1) upon request of the President, or (2) upon resolution of either or both Houses of Congress, or (3) upon its own motion, or (4) when in the judgment of the commission there is good and sufficient reason therefor, upon application of any interested party, shall investigate the differences in the costs of production of any domestic article and of any like or similar foreign article. In the course of the investigation the commission shall hold hearings and give reasonable public notice thereof, and shall afford reasonable opportunity for parties interested to be present, to produce evidence, and to be heard at such hearings. The commission is authorized to adopt such reasonable procedure and rules and regulations as it deems necessary to execute its functions under this section. The commission shall report to the President the results of the investigation and its findings with respect to such differences in costs of production. If the commission finds it shown by the investigation that the duties expressly fixed by statute do not equalize the differences in the costs of production of the domestic article and the like or similar foreign

article when produced in the principal competing country, the commission shall specify in its report such increases or decreases in rates of duty expressly fixed by statute (including any necessary change in classification) as it finds shown by the investigation to be necessary to equalize such differences. In no case shall the total increase or decrease of such rates of duty exceed 50 per centum of the rates expressly fixed by statute.

(b) CHANGE TO AMERICAN SELLING PRICE.—If the commission finds upon any such investigation that such differences cannot be equalized by proceeding as hereinbefore provided, it shall so state in its report to the President and shall specify therein such ad valorem rates of duty based upon the American selling price (as defined in section 402 (g)) of the domestic article, as it finds shown by the investigation to be necessary to equalize such differences. In no case shall the total decrease of such rates of duty exceed 50 per centum of the rates expressly fixed by statute, and no such rate shall be increased.

(c) PROCLAMATION BY THE PRESIDENT.—The President shall by proclamation approve the rates of duty and changes in classification and in basis of value specified in any report of the commission under this section, if in his judgment such rates of duty and changes are shown by such investigation of the commission to be necessary to equalize such differences in costs of production.

(d) EFFECTIVE DATE OF RATES AND CHANGES.—Commencing thirty days after the date of any presidential proclamation of approval the increased or decreased rates of duty and changes in classification or in

basis of value specified in the report of the commission shall take effect.

(e) ASCERTAINMENT OF DIFFERENCES IN COSTS OF PRODUCTION.—In ascertaining under this section the differences in costs of production, the commission shall take into consideration, insofar as it finds it practicable:

(1) IN THE CASE OF A DOMESTIC ARTICLE.—(A) The cost of production as hereinafter in this section defined; (B) transportation costs and other costs incident to delivery to the principal market or markets of the United States for the article; and (C) other relevant factors that constitute an advantage or disadvantage in competition.

(2) IN THE CASE OF A FOREIGN ARTICLE.—(A) The cost of production as hereinafter in this section defined, or, if the commission finds that such cost is not readily ascertainable, the commission may accept as evidence thereof, or as supplemental thereto, the weighted average of the invoice prices or values for a representative period and/or the average wholesale selling price for a representative period (which price shall be that at which the article is freely offered for sale to all purchasers in the principal market or markets of the principal competing country or countries in the ordinary course of trade and in the usual wholesale quantities in such market or markets; (B) transportation costs and other costs incident to delivery to the principal market or markets of the United States for the article; (C) other relevant factors that constitute an advantage or disadvantage in competition, including advantages granted to the foreign producers by a government, person, partnership, corporation, or association in a foreign country.

(f) MODIFICATION OF CHANGES IN DUTY.—Any increased or decreased rate of duty or change in classification or in basis of value which has taken effect as above provided may be modified or terminated in the same manner and subject to the same conditions and limitations (including time of taking effect) as is provided in this section in the case of original increases, decreases, or changes.

(g) PROHIBITION AGAINST TRANSFERS FROM THE FREE LIST TO THE DUTIABLE LIST OR FROM THE DUTIABLE LIST TO THE FREE LIST.—Nothing in this section shall be construed to authorize a transfer of an article from the dutiable list to the free list or from the free list to the dutiable list, nor a change in form of duty. Whenever it is provided in any paragraph of Title I of this Act, or in any amendatory Act, that the duty or duties shall not exceed a specified ad valorem rate upon the articles provided for in such paragraph, no rate determined under the provisions of this section upon such articles shall exceed the maximum ad valorem rate so specified.

(h) DEFINITIONS.—For the purpose of this section—

(1) The term "domestic article" means an article wholly or in part the growth or product of the United States; and the term "foreign article" means an article wholly or in part the growth or product of a foreign country.

(2) The term "United States" includes the several States and Territories and the District of Columbia.

(3) The term "foreign country" means any empire, country, dominion, colony, or protectorate, or any subdivision or subdivi-

sions thereof (other than the United States and its possessions).

(4) The term "cost of production", when applied with respect to either a domestic article or a foreign article, includes, for a period which is representative of conditions in production of the article: (A) The price or cost of materials, labor costs, and other direct charges incurred in the production of the article and in the processes or methods employed in its production; (B) the usual general expenses, including charges for depreciation or depletion which are representative of the equipment and property employed in the production of the article and charges for rent or interest which are representative of the cost of obtaining capital or instruments of production; and (C) the cost of containers and coverings of whatever nature, and other costs, charges, and expenses incident to placing the article in condition packed ready for delivery.

(i) RULES AND REGULATIONS OF PRESIDENT.—The President is authorized to make all needful rules and regulations for carrying out his functions under the provisions of this section.

(j) RULES AND REGULATIONS OF SECRETARY OF TREASURY.—The Secretary of the Treasury is authorized to make such rules and regulations as he may deem necessary for the entry and declaration of foreign articles of the class or kind of articles with respect to which a change in basis of value has been made under the provisions of subdivision (b) of this section, and for the form of invoice required at time of entry.

(k) INVESTIGATIONS PRIOR TO ENACTMENT OF ACT.—All uncompleted investigations instituted prior to the approval of this Act

under the provisions of section 315 of the Tariff Act of 1922, including investigations in which the President has not proclaimed changes in classification or in basis of value or increases or decreases in rates of duty, shall be dismissed without prejudice; but the information and evidence secured by the commission in any such investigation may be given due consideration in any investigation instituted under the provisions of this section.

* * * * *

SEC. 402. VALUE.

* * * * *

(d) EXPORT VALUE.—The export value of imported merchandise shall be the market value or the price, at the time of exportation of such merchandise to the United States, at which such or similar merchandise is freely offered for sale to all purchasers in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of whatever nature, and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States.

* * * * *

(g) AMERICAN SELLING PRICE.—The American selling price of any article manufactured or produced in the United States shall be the price, including the cost of all containers and coverings of whatever nature and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for delivery, at which such article is freely offered for sale to all purchasers in

the principal market of the United States, in the ordinary course of trade and in the usual wholesale quantities in such market, or the price that the manufacturer, producer, or owner would have received or was willing to receive for such merchandise when sold in the ordinary course of trade and in the usual wholesale quantities, at the time of exportation of the imported article.

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